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No. 05-1422

Supreme Court, U.S.
FILED
AUG 9 - 2006
OFFICE OF THE CLERK

In The
Supreme Court of the United States

DILLARD'S, INC.,

Petitioner,

v.

AZPB LIMITED PARTNERSHIP d/b/a ARIZONA DIAMONDBACKS and PHOENIX ARENA DEVELOPMENT LIMITED PARTNERSHIP,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals Of The State Of Arizona

REPLY TO BRIEF IN OPPOSITION

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Petitioner Dillard's, Inc. respectfully submits this Reply to the Brief in Opposition filed by Respondents.[1]

I. THE PRECLUSION ISSUES IN THIS CASE HAVE BEEN PRESERVED FOR THIS COURT'S REVIEW.

The Arizona courts had "a fair opportunity to address the federal question that is sought to be presented here." *Webb v. Webb*, 451 U.S. 493, 501 (1981). So long as the state court had an opportunity, "[n]o particular form of words or phrases is essential . . . [a]nd if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented." *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928). The record reflects Dillard's repeated attempts to explain to the Arizona courts the preclusive effect of the judgment obtained in a federal bankruptcy court. And Dillard's cited this Court's decision in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), several times, not only in general discussions of preclusion issues, but also particularly with reference to privity. Resp. App. at 18-19, 21.

More fundamentally, however, neither Respondents nor the Arizona courts could have failed to comprehend that Dillard's was asserting preclusion arising from the judgment of a federal court. Federal common law governs this issue. *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508 (2001). Thus, this case does not involve a situation where a party has rights under both federal and state law but raises them in an ambiguous manner. *Compare Webb*, 451 U.S. at 496-97 (reasoning that invocation of "full faith and credit" might refer to Federal Constitution or state statute) *with Bryant*, 278 U.S. at 68-69 (reasoning that because state constitution lacked equal protection clause, invocation of "equal protection" raised federal issue).

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[1] Dillard's incorporates by reference the Corporate Disclosure Statement on page (ii) of its Petition for Writ of Certiorari.

Moreover, even if Dillard's had not adequately raised a federal issue, the issue would be properly before the Court because the Arizona trial court's opinion establishes that it actually considered and decided the issue. "'[I]t is irrelevant to inquire . . . when a Federal question was raised in a court below when it appears that such question was actually considered and decided.'" *Orr v. Orr*, 440 U.S. 268, 274-75 (1979) (quoting *Manhattan Life Ins. Co. v. Cohen*, 234 U.S. 123, 134 (1914)). The Arizona trial court's opinion reflects that it considered Dillard's preclusion arguments, knew that the prior decision issued from a federal bankruptcy court, concluded that preclusion was not applicable, and even recognized that its decision would be erroneous if it had resolved the preclusion question incorrectly. App. to Pet. at 21.

With citations to federal authority and in seven separate briefs, motions, and petitions, Dillard's reminded the Arizona courts that one of the issues before them was the preclusive effect of a federal bankruptcy judgment. The Arizona trial court considered and decided, incorrectly, that issue. On this record, this Court should conclude that a federal claim was "brought to the attention of the state court with fair precision and in due time." *Bryant*, 278 U.S. at 67.

II. RESPONDENTS DO NOT SERIOUSLY DISPUTE THE IMPORTANCE OF THE QUESTIONS PRESENTED.

Respondents have not addressed the arguments of Dillard's regarding the importance of the issue involved in this case: that holding creditors to the results of their trustee's litigation will ensure finality in bankruptcy proceedings, avoid the administrative difficulties that result from the pursuit of duplicative litigation, and reinforce the fundamental bankruptcy policy of equal treatment of creditors. Pet. at 12-16. Instead, Respondents' argument regarding the importance of the issues turns largely on the proposition that the *opinion* below is unimportant because it has been declared unpublished by the Arizona Court of

Appeals. This Court's Rule 10, however, addresses the importance of the question, not the importance of the opinion. In any event, this Court has shown little hesitation to review unpublished decisions in the past. For example, in June 2006 alone, this Court decided three cases arising from unpublished or non-precedential decisions, including one arising from the Arizona Court of Appeals;[2] granted writs of certiorari in two others;[3] and vacated and remanded two other judgments for further consideration.[4]

Respondents also argue briefly that the decision below involved merely a misapplication of a properly stated rule of law. At the same time, they acknowledge that the Arizona Court of Appeals did not even state the relevant rule of law. Br. in Opp. at 15. Indeed, that court did not address preclusion principles at all except to state, inaccurately, that it need not address them. App. to Pet. at 9 n.3.

III. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT, THE COURTS OF APPEALS, AND STATE COURTS OF LAST RESORT.

In their efforts to avoid review by this Court, Respondents have distorted the holdings and significance of precedents of this and other courts, in some cases beyond all recognition. Properly analyzed, the cases cited by Dillard's clearly demonstrate a split of authority, as well as

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[2] *Clark v. Arizona*, 126 S. Ct. 2709 (2006) (reviewing unpublished decision of Arizona Court of Appeals); *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006) (reviewing unpublished decision of Supreme Court of Virginia in companion case of *Bustillo v. Johnson*, No. 05-51); *Hudson v. Michigan*, 126 S. Ct. 2159 (2006) (reviewing unpublished decision of Michigan Court of Appeals).

[3] *KSR Int'l Co. v. Teleflex, Inc.*, 126 S. Ct. 2965 (2006) (granting certiorari to review non-precedential decision of Federal Circuit); *Burton v. Waddington*, 126 S. Ct. 2352 (2006) (granting certiorari to review unpublished decision of Ninth Circuit).

[4] *Friemann v. United States*, 126 S. Ct. 2859 (2006) (vacating non-precedential decision of Second Circuit); *Bazan v. United States*, 126 S. Ct. 2860 (2006) (vacating unpublished decision of Fifth Circuit).

the divergence of the decision below from this Court's holding in *Heiser v. Woodruff*, 327 U.S. 726 (1946).

Respondents assert that the holding of *Heiser* is that bankruptcy courts must apply the principle of res judicata. Br. in Opp. at 24. To be sure, the Court so concluded, but the case is significant for reasons requiring a more detailed examination of the facts. The unremarkable aspect of *Heiser* is the holding that the bankruptcy trustee, having sought and failed in a federal district court to set aside Heiser's judgment against the debtor, was precluded from objecting to the allowance of the claim in the bankruptcy court. *See Heiser*, 327 U.S. at 736. But the dispute in bankruptcy court also involved two creditors, Willie Mae Woodruff and Ida Belle Woodruff, who were not parties to the effort in district court to set aside Heiser's judgment. *See Woodruff v. Heiser*, 150 F.2d 869, 870 (10th Cir. 1945), *rev'd*, 327 U.S. 726 (1946). By reversing the Tenth Circuit, which would have allowed the trustee and these creditors to attack Heiser's judgment in bankruptcy court, this Court barred both the trustee and the creditors from relitigating issues that the creditors had not previously litigated. *See Heiser*, 327 U.S. at 740 (holding that issue of fraud "may not now be relitigated in the bankruptcy court"). Viewed in this context, the Court's statements that the trustee "represents the bankrupt and his creditors" and that the issue of fraud "was decided against the trustee, the bankrupt and those whom they represent or who claim under them" are far from surplusage, as Respondents suggest; instead, this language expresses the Court's conclusion that creditors are bound by the results of litigation conducted by a trustee for their benefit. *Id.* at 734, 736.

Respondents also argue that there is no split of authority justifying certiorari review of the case below, because the cases cited by Dillard's involve, in effect, creditors' attempts to assert claims on behalf of bankruptcy estates after trustees have done so unsuccessfully or have settled their claims. Br. in Opp. at 25. As a threshold matter, there is no meaningful distinction between a creditor's pursuit of a recovery for its own benefit after a

trustee has unsuccessfully pursued the same recovery for the benefit of that creditor, as in this case, and a creditor's pursuit of a claim on behalf of a bankruptcy estate after a trustee has unsuccessfully pursued that claim for the benefit of the estate. But even if there were such a distinction, a number of the cases cited by Dillard's do not involve the fact pattern posited by Respondents.

For example, in *In re Fortier*, 161 Fed. Appx. 514 (6th Cir. 2005), a creditor who had not previously received notice of a bankruptcy case sought allowance of a priority claim and disgorgement of funds paid to the IRS as part of a settlement with the trustee. In seeking to recover those funds, the priority creditor was not acting for the benefit of the bankruptcy estate; she wanted to receive them for herself. The Sixth Circuit held that the creditor was in privity with the trustee and thus could not upset the IRS settlement "because the trustee acted on behalf of all of [the debtor's] creditors when reaching a settlement with the IRS." *Id.* at 517. Similarly, in *In re Met-L-Wood Corp.*, 861 F.2d 1012 (7th Cir. 1988), *cert. denied*, 490 U.S. 1006 (1989), creditors were parties to a proceeding in which the debtor-in-possession sought to sell its assets. Naturally, when the creditors supported the sale, they did so in pursuit of their own interests; the debtor-in-possession represented the estate. After the sale closed, a trustee was appointed and sought to set aside the sale as tainted by fraud. The Seventh Circuit concluded that the trustee could not attack the sale because the creditors he represented had already successfully supported it, and the court had approved it (although the court left open the possibility that the trustee might be able to act on behalf of previously-uninvolved creditors). *Id.* at 1017.

Finally, *In re Medomak Canning*, 922 F.2d 895 (1st Cir. 1990), involved a claim of equitable subordination under 11 U.S.C. § 510(c), which creditors attempted to assert after a trustee settled it. The First Circuit's decision was not based on the premise that the creditors were seeking to act on behalf of the bankruptcy estate, as Respondents suggest. Indeed, the bankruptcy estate would not have benefited in any way from the subordination of

the defendant's claim; the estate would have owned the same assets and would have remained liable to the same creditors in the same amounts. *See* 4 *Collier on Bankruptcy* ¶ 510.02[2] (15th ed. rev. 2006) ("A creditor whose claim has been subordinated does not cease to be a creditor under the Code.") Only certain creditors would have benefited from the subordination of another creditor's claim. The First Circuit concluded that the creditors seeking equitable subordination were bound by the action of the trustee "as their fiduciary and representative to vindicate their interest." *Medomak Canning*, 922 F.2d at 902.[5]

IV. DILLARD'S HAS NOT MADE JUDICIAL ADMISSIONS OR PREVAILED ON ANY ISSUE GIVING RISE TO JUDICIAL ESTOPPEL.

Respondents' argument that Dillard's is bound by purported judicial admissions is easily answered by reference to the cases that they cite. "'Judicial admissions are formal concessions in the pleadings, or stipulations by a party or its counsel, that are binding upon the party making them.'" *Soo Line R.R. Co. v. St. Louis Southwestern Ry. Co.*, 125 F.3d 481, 483 (7th Cir. 1997) (citation omitted). Respondents have not identified any pleading or stipulation in which Dillard's conceded any matter pertinent here. Instead, Respondents apparently seek to hold Dillard's to a legal position that it purportedly argued below. In another of the cases cited by Respondents, a single member of a three-judge panel reached a conclusion less extraordinary than Respondents', deeming a statement at oral argument to be a judicial admission. *See McCaskill v. SCI Mgt. Corp.*, 298 F.3d 677, 680 (7th Cir. 2002) (opinion of Bauer, J.). Concurring in the judgment, another judge described this conclusion as "simply stunning" and cited authority demonstrating that counsel's

[5] Respondents also have not even attempted to distinguish the cases cited in footnote 4 on page 9 of the Petition.

statement of a legal theory of a case has never been considered a judicial admission. *Id.* at 681 (Rovner, J., concurring in judgment). The third member of the panel dissented, leaving Judge Bauer without support for his conclusion.

Respondents' papers also include two arguments regarding judicial estoppel, neither of which is persuasive. Judicial estoppel requires that "the party has succeeded in persuading a court to accept that party's earlier position"; otherwise, a change in position "poses little threat to judicial integrity." *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001); *see also Zedner v. United States*, 126 S. Ct. 1976, 1988 (2006) (declining to apply doctrine). Dillard's has had no success in persuading the Arizona courts to adopt its preclusion arguments, regardless of the applicable source of law. Nor did Dillard's convince the Bankruptcy Court in the earlier litigation that the funds at issue belonged to Respondents.[6] Instead, the Bankruptcy Court decided the litigation in favor of Dillard's, and the Ninth Circuit affirmed, on the bases that Dillard's property recouped amounts owed to it from amounts it owed to ETM and that ETM, having earlier repudiated the contract, had no claim for breach of it. App. to Pet. at 23-25.

Moreover, even if the Bankruptcy Court had adopted Dillard's argument regarding property of the estate,

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[6] Dillard's did not argue, as Respondents suggest, that the Trustee could not recover the funds at issue because Dillard's desired all along to pay them to Respondents. Rather, as the materials in Respondents' own appendix make clear, Dillard's argued (1) that the funds were not property of the bankruptcy estate because they had been recouped and applied to ETM's obligations to Dillard's a week before the bankruptcy estate even existed; and alternatively (2) that because ETM served as a conduit or agent for Respondents and others, the estate had only bare legal title to, and not an equitable interest in, the funds at issue, as provided by 11 U.S.C. § 541(d). Resp. App. at 71-78, 82. Stated differently, Dillard's did not argue or acknowledge that Respondents had the right to receive what Dillard's had; the argument was that Respondents had the right to receive whatever the Trustee recovered, which was nothing, as Dillard's consistently maintained.

Dillard's would not be judicially estopped. Judicial estoppel requires that a party's two positions be clearly inconsistent. *New Hampshire*, 532 U.S. at 750; *Zedner*, 126 S. Ct. at 1988. There is nothing inconsistent between Dillard's positions before the Bankruptcy Court and Dillard's positions now, either at an overall level (Dillard's is not liable to the Trustee; Dillard's is not liable to Respondents) or with respect to the particular issue of property of the estate (if the Trustee received money from Dillard's, he would be required to pay it over to Respondents; Respondents are in privity with the Trustee).

V. RESPONDENTS' ARGUMENTS ON THE MERITS ARE UNAVAILING.

Woven throughout Respondents' brief in opposition are several arguments addressing the merits of the underlying dispute. Dillard's is prepared to address the merits in much greater detail should the Petition be granted, but several points call for a brief response here.

First, Respondents argue that they, the Trustee, and Dillard's all had mutually antagonistic interests. Br. in Opp. at 22. To a large degree, this argument is based on the assumption that the Trustee would have distributed any recovery in the Bankruptcy Litigation pro rata to ETM's creditors, rather than turning over to Respondents the portion of the recovery relating to sales of tickets to their events. Br. in Opp. at 18. However, the Trustee alleged that ETM served as a "conduit," a bankruptcy term of art with a significance that could not have been lost on him or his attorneys. Resp. App. at 67; *see also In re Golden Triangle Capital, Inc.*, 171 B.R. 79, 83 (B.A.P. 9th Cir. 1994) ("[T]he funds never became property of the estate since Triangle was only a conduit for the funds; except for its nominal fee, the debtor never had rights in the funds. . . .").[7] Additionally, Respondents undertook

[7] Indeed, Respondents themselves adopt the "conduit" label in their Brief in Opposition. Br. in Opp. at 20.

substantial efforts behind the scenes to support the Trustee's litigation, which would have made little sense unless they expected to benefit from his success. *See* Resp. App. at 25-34; *see also Montana v. United States*, 440 U.S. 147, 154 (1979) ("'[O]ne who prosecutes or defends a suit in the name of another to establish and protect his own right, or who assists in the prosecution or defense of an action in aid of some interest of his own . . . is as much bound . . . as he would be if he had been a party to the record.'") (quoting *Souffront v. Compagnie des Sucreries*, 217 U.S. 475, 486-87 (1910)).

Second, Respondents claim that the only common issue in the Bankruptcy Court litigation and the Arizona litigation was the interpretation of the contract between Dillard's and ETM. The short response to this argument is that claim preclusion does not require commonality of issues; it depends on a common transaction or series of transactions. *See* Restatement (Second) of Judgments § 24(1) (1982). There is no disagreement that all of the litigation arose out of Dillard's retention of funds otherwise payable to ETM in satisfaction of ETM's obligations to Dillard's, an event that Dillard's claims was proper and Respondents claim was not. But even with respect to issue preclusion, where the focus is on issues actually litigated, the Bankruptcy Court's conclusion that Dillard's properly exercised a right of recoupment is squarely inconsistent with the Arizona Court of Appeals' determination that there was no justification for Dillard's actions. *See* App. to Pet. at 13. Thus, Respondents' bold assertion that the two judgments are "entirely consistent" is entirely inaccurate. Br. in Opp. at 17.

Third, Respondents claim that the preclusive effect of the Bankruptcy Court's judgment is somehow limited, if not nullified, because of that court's jurisdiction. In essence, Respondents argue that because the Bankruptcy Court did not and supposedly could not adjudicate their claim of unjust enrichment, its judgment has no preclusive effect on them. This argument is flawed in several respects. First, it is inconsistent with this Court's precedent. *See Matsushita Electric Industrial Co. v. Epstein*, 516 U.S. 367, 369 (1996) (holding that state-court judgment may

have preclusive effect on claims within exclusive federal jurisdiction). Second, even assuming that the Bankruptcy Court's jurisdiction were limited to the degree posited by Respondents, its jurisdiction was sufficient to allow it to entertain a claim by the Trustee for unjust enrichment, with the proceeds benefiting Respondents. Finally, the Bankruptcy Court's jurisdiction was broad enough to allow it to entertain an adversary proceeding by Respondents against Dillard's, for every dollar recovered by Respondents would have reduced their claims against the estate and reduced the Trustee's ability to recover from Dillard's, both of which would have affected the bankruptcy estate. *See Celotex Corp. v. Edwards*, 514 U.S. 300, 307 n.5 (1995) ("Proceedings 'related to' the bankruptcy include . . . suits between third parties which have an effect on the bankruptcy estate."). Accordingly, whether Respondents were in privity with the Trustee must be decided for reasons unrelated to bankruptcy jurisdiction.

CONCLUSION

For the reasons stated herein and in the Petition for Writ of Certiorari, the Petition should be granted.

Respectfully submitted,

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